November 2005

Indiana County Courthouses

The Indiana Prosecutor

PROSECUTORS CHOSEN BY GOVERNOR FOR JUDGESHIPS

Governor Mitch Daniels announced on November 14, the appointment of six judges. Five appointments will fill vacancies in new courts recently created by the Indiana General Assembly. Those new courts are located in Dearborn, DeKalb, Howard, Monroe, and Vigo counties. The sixth appointment fills a vacancy created by the resignation of an elected judge in Boone County.

"The people of Indiana are fortunate to have qualified and talented individuals willing to serve as judges," said Daniels. "I'm confident each of these appointees will serve the citizens of their counties with distinction as they further the interests of fairness and justice on the bench."

The new judges in Dearborn, DeKalb, Monroe and Vigo counties will begin their duties on January 1, 2006. The judge in Howard County will begin on January 6. The term of appointment in these five new courts expires on December 31, 2006. To continue in the position, each judge must be elected to a succeeding term.

Sally A. Blankenship of Lawrenceburg has been appointed judge of Dearborn Superior Court II. For the past 10 years, Blankenship has served as prosecuting attorney for the Seventh Judicial Circuit. Prior to that Blankenship spent four years as deputy prosecuting attorney for Dearborn and Ohio Counties.

Monte L. Brown of Spencerville has been appointed judge in DeKalb Superior Court II. Brown has served as DeKalb County Prosecutor for 16 years. Prior to that, Brown worked in private practice for 11 years.

George A. Hopkins of Kokomo was appointed judge of Howard Superior Court IV. Hopkins currently serves as a Howard County deputy prosecutor. Previously he worked in private practice and served as a judge advocate in the Indiana Army National Guard, retiring with the rank of Colonel.

Jeffery Alan Chalfant of Bloomington has been appointed judge of Monroe County Circuit Court VIII. Chalfant is currently an attorney with the firm of Bauer & Densford. Chalfant previously served as a deputy prosecutor and public defender in Monroe County.

James R. Walker of Terre Haute has been appointed judge of Vigo Superior Court VI. Walker has worked in the Vigo County Prosecutor's Office for 26 years, serving as chief deputy for the last 22 years.

Rebecca S. McClure of Lebanon was the Governor's choice to fill the vacancy created by the resignation of the elected judge in Boone County Superior Court II. She succeeds Judge James R. Detamore, who is resigning effective December 31. McClure currently serves as assistant executive director of the Indiana Prosecuting Attorneys Council. Previously McClure served for 11 years as Boone County Prosecutor and has also worked in private practice. ❖

Inside this Issue

• JURY TRIALS IN SPEEDING CASES

***Cunningham v. State*, ___N.E.2d___ (Ind. Ct. App 10/25/05)**

Elliott Cunningham filed a *pro se* motion requesting a jury trial in Lake Superior Court after he was cited into that court for speeding. He renewed his jury trial request at the time of trial. The trial court denied Cunningham's requests, found that he had been speeding, and fined him in accord with its judgment. Cunningham appealed.

The dispositive issue on appeal was whether, under Article I Section 20 of the Indiana Constitution, Cunningham was entitled to a jury trial in his speeding case. Cunningham contended that Article I, Section 20 which provides that "[i]n all civil cases, the right to jury shall remain inviolate" mandated a jury trial in his case. Does, in fact, that provision mean that persons cited for traffic infractions or ordinance violations are entitled to a jury?

In 1981, the Indiana Legislature passed I.C. 34-4-32-1 to 5 governing the procedures for enforcing violations of infractions and municipal ordinances. Prior to the enactment of those statutes, all traffic offenses were criminal in nature. The passage of these provisions mandated that from that time forward all such violations were to be governed by the Indiana Rules of Trial Procedure.

In another case analyzing a party's right to jury trial in 2002, Indiana Supreme Court Justice Boehm wrote - "[i]f a cause of action existed on June 18, 1852, then this issue is decided by history." Where the cause of action at issue was not in existence on that date, the crucial inquiry is whether the cause of action at issue is equitable or legal in nature as those terms were used in 1852. "If an action is essentially legal in nature, a jury demand must be honored," Justice Boehm opined.

Today, speeding infractions, although now governed by the Indiana Rules of Trial Procedure, remain quasi-criminal in nature, the Court said. Speeding infractions are enforced by the police; speeding complaints are initiated and litigated by a prosecutor on behalf of the State; and violators are fined by the government. Quasi-criminal actions have historically been deemed non equitable. In 1852, such actions would have entitled the person charged to a trial by jury.

The Court of Appeals held that the Lake County trial court had improperly denied Cunningham's request for a jury trial in violation of Article I Section 20 of the Indiana Constitution. ❖

• WIFE MAY TESTIFY AGAINST HUSBAND

***Glover v. State*, ___N.E.2d___ (Ind. Sup. Ct. 11/2/05)**

At John Glover's murder trial, Glover filed a motion to suppress his wife's testimony. A trial court in Marion County denied Glover's motion and interlocutory appeal was taken. The Indiana Supreme Court held that a court cannot require the wife of a defendant to testify as to confidential communications between she and her husband, but the marital privilege does not bar her voluntary testimony.

Kamaljett Dhaliwal, a native of India, moved to the United States and married Andrew Adbul, a U.S. citizen. When the couple divorced in December, 2001, Dhaliwal faced deportation. John Glover, a co-worker and good friend, agreed to marry Dhaliwal "on paper" so that she could remain in the United States. The two were married but retained separate apartments.

On September 17, 2002, Tammy Gibbs, a resident of the same apartment complex in which Glover and Dhaliwal maintained their residences, was found strangled in her apartment. A neighbor had seen Gibbs talking to Glover earlier that morning. Glover admitted that he had been in the complex to see Dhaliwal but denied seeing Gibbs on the day of her death.

Two weeks after the murder, Dhaliwal called the police and told them that Glover had come to her apartment on the morning of Gibb's murder and told her that he had killed Gibbs. Glover even demonstrated for Dhaliwal the manner in which he had strangled his victim, Dhaliwal reported.

The State charged Glover with murder and listed Dhaliwal as a witness. Glover moved to suppress his wife's testimony, claiming marital privilege, I.C. 34-46-3-1(4). The trial court denied the motion, after hearing, on the ground that the marriage was a sham. The case was certified for interlocutory appeal. The Court of Appeals reversed the trial court's ruling reasoning that there is no "fraudulent" marriage exception to the privilege and Dhaliwal could not testify against Glover at his trial.

(continued on page 3)

Recent Decisions Update (continued)

The Indiana Supreme Court granted transfer. The Supreme Court agreed with the Court of Appeals that Indiana does not recognize a "fraudulent" marriage exception to the marital privilege. It was undisputed that Glover's marriage to Dhaliwal was valid under Kentucky law and that the marriage had not been annulled or voided at the time of the communication about which Dhaliwal intended to testify. The Court held that a marriage valid under applicable law is sufficient to permit a witness to invoke the marital privilege.

The Court noted that the marital privilege is more limited than the privileges attaching to communications with attorneys, physicians, and clerics. In a decision applauded by prosecutors, the Supreme Court held that the marital privilege prevents a court from requiring a spouse to testify as to confidential marital communications BUT does not bar that spouse from testifying if the spouse chooses to do so. In a unanimous decision, the Court affirmed denial of the defendant's motion to suppress. ❖

- **MARION COUNTY DIVERSION PROGRAM RULED UNCONSTITUIONAL**

***Mueller and Evans v. State,* ___N.E.2d____(Ind. Ct. App 11/16/05)**

Jamie Mueller and Vickie Evans appealed the Marion County Superior Court's refusal to require the Marion County Prosecutor to permit them to participate in a pretrial diversion program. The dispositive issue in this appeal was whether requiring payment of a fee as an absolute condition of participating in a pretrial diversion program violated the Fourteenth Amendment to the United States Constitution.

Mueller was charged with being a minor in a tavern, a Class C Misdemeanor. A public defender was appointed upon the trial court's determination that she was indigent. The Prosecutor offered to allow Mueller to participate in that office's pretrial diversion program and Mueller accepted. The trial court found it credible that Mueller believed she could pay the fees associated with participation in this program. When she could not pay, the Prosecutor sought to withdraw the pretrial diversion agreement on the sole basis of Mueller's inability to pay the fees.

"The citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

Vickie Evans was charged with conversion, a Class A Misdemeanor. Evans was found indigent and a public defender was appointed to represent her. The Prosecutor also offered Evans the opportunity to participate in a pretrial diversion program. However, unlike Mueller, Evans never executed a pretrial diversion agreement because she did not believe she could pay the required fees.

Mueller and Evans requested that the trial court require the Prosecutor to allow them to participate in the pretrial diversion program, notwithstanding their inability to pay. The trial court found that at least at the time of Mueller's and Evan's cases, the Prosecutor's practice and policy in implementing his pretrial diversion program was that persons who were unable to pay the fees were denied entry into the program or were removed from the program if they could not pay. The trial court concluded that requiring payment of the fees as a condition of participation in the pretrial diversion program was a rational requirement that violated neither the United States nor Indiana Constitutions.

A review of the pretrial diversion statute led the Court of Appeals to conclude that the statute itself is constitutional on its face. That statute does not require the payment of fees, either statutorily-denominated or otherwise, as an absolute condition of participation in a pretrial diversion program. But, the analysis of the situation did not end there.

The Court of Appeals concluded that foreclosing a benefit that the State offers to defendants in the criminal justice system, based solely on an inability to pay a fee or fine is a violation of the Fourteenth Amendment. The argument that the fees help offset the costs of running the pretrial diversion program was not sufficient to establish a rational basis for distinguishing between the indigent and those able to pay the fees, the Court said. As such, the Court held, precluding Mueller and Evans from participating in the Prosecutor's pretrial diversion program based solely on their asserted inability to pay the fees violated their rights under the Fourteenth Amendment.

The Court went on to say that should a prosecutor not exercise his or her discretion independently to waive payment of any or all fees without court involvement, the trial court should make such an indigency determination in pretrial diversion cases. If a defendant is found unable to pay the fee, he or she must be offered an alternative to full payment of that fee. This could take the form of complete waiver of the fee, partial waiver, implementation of a reasonable payment schedule, replacement of the fee with a nonfinancial (but reasonable) requirement such as community service, or some combination of partial waiver and non-financial requirement. Allowing some defendants and not others to completely avoid prosecution and a potential criminal conviction, based solely on their respective abilities to pay certain fees, violates the principle that the criminal justice system should be operated without regard to a defendant's financial resources, the Court said. "The citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility." ❖

U.S. SUPREME COURT GRANTS *CERT* IN INDIANA CASE

Hopefully, this term, the Supreme Court of the United States will clarify the meaning of "testimonial" as that statement was used in its *Crawford v. Washington* opinion last year. The real issue is whether certain out-of-court accusations may be used in lieu of in-court testimony without violating a defendant's Sixth Amendment right to confront the witness who made the statement.

On October 31, the High Court announced that it had granted *certiorari* in an Indiana case, *Hammon v. State.* That case raised confrontation clause issues in the context of the excited utterance exception to the hearsay rule.

Prior to *Crawford v. Washington*, any hearsay statement was admissible if the hearsay exception utilized to support the introduction of the statement was a firmly rooted exception and the trial court found the statement to be reliable and trustworthy. *Crawford* changed the rules. *Crawford* bars "testimonial" hearsay introduced by the prosecution unless the witness is unavailable and the defense has had an opportunity to previously cross-examine the witness. Unfortunately, the Supreme Court at the time it decided *Crawford* did not include in that opinion a comprehensive definition of just what constitutes a "testimonial" statement. As a result, judges across the country have been struggling with deciding what kinds of statements fit within the definition of a "testimonial" statement under *Crawford.*

In *Hammon,* police responded to a domestic violence call at the home of Hershel Hammon and his wife, Amy. Amy initially denied that there had been a problem at the residence. When questioned again at the scene, however, Amy said that Hershel had punched her twice in the chest and thrown her to the ground onto broken glass. At the request of one of the responding officers, Amy also filled out a battery affidavit.

Amy was subpoenaed to testify, but did not show up for trial. The trial judge allowed the officer to repeat Amy's oral statements to him as excited utterances. The court also allowed into evidence the battery affidavit. It was admitted under the present sense impression exception to the hearsay rule. Hershel was convicted and he appealed. The Indiana Supreme Court found that the motivation of a government agent questioning a witness is more determinative -for the purposes of determining the future legal use of the statement - than is the motivation of the responder. The motivation of either the questioner or the respondent could render a statement testimonial, however, the Court went on to say.

In *Hammon*, the Supreme Court also looked at the particular circumstance under which Amy was questioned. The Court held that Amy Hammon's oral statement to the police was properly admitted into evidence in that "responses to initial inquiries by officers arriving at a scene are typically not testimonial," the Court said. The battery affidavit, however, was deemed testimonial and should have been excluded.

CAN ONE SPOUSE BLOCK CONSENT TO SEARCH GIVEN BY OTHER?

On Tuesday, November 8, 2005, the Supreme Court of the United States heard oral argument in the case of *Georgia v. Scott Fitz Randolph.* A issue: Whether the Fourth Amendment requires consent from both a husband and wife if both are present when police ask permission to search their house to investigate allegations of criminal activity.

Randolph and his wife were arguing over the wife taking the couple's son to Canada. When Randolph took the boy to a neighbor's house to prevent his wife from leaving with the boy, Mrs. Randolph called the police. When officers arrived, Mrs. Randolph told them that her husband had been using cocaine. Mr. Randolph told the police that it was his wife who had been the drug user.

Faced with these allegations of illegal drug use, the police asked the Randolphs for consent to search their home. Mrs. Randolph agreed. Mr. Randolph**,** a lawyer, however, refused to let the police into the house without a warrant. Mrs. Randolph then led the police to her husband's bedroom where they found apparent drug paraphernalia and a white powder that appeared to be cocaine.

Although Mrs. Randolph subsequently changed her mind and withdrew her consent, armed with the search warrant, the police entered the Randolph's home anyway. They seized 25 drug-related items from the home. Mr. Randolph was arrested and later indicted for cocaine possession.

The Georgia Supreme Court said that when two people have equal control and use of a house, one occupant's consent for a police search is not valid if the other occupant is also present and objects to the warrantless search. The Georgia Attorney General argued that there is a reduced expectation of privacy when one shares a house or apartment with another person and the consent of one should be sufficient.

The U.S. Supreme Court will now decide the issue. ❖